



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 20, 2004

Mr. David K. Walker
County Attorney
County of Montgomery
210 West Davis, Suite 400
Conroe, Texas 77301

OR2004-8922

Dear Mr. Walker:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 211291.

The Montgomery County Sheriff's Department (the "sheriff") received a request for information related to a specified incident. You state that some responsive information has been provided to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.003(1)(b), 552.101, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we address your representation that some of the submitted information relates to grand jury proceedings. This office has concluded that a grand jury is not a governmental body that is subject to the Act, chapter 552 of the Government Code, so that records that are within the actual or constructive possession of a grand jury are not subject to disclosure under the Act. *See* Gov't Code §§ 552.003(1)(B) (Act's definition of governmental body does not include judiciary), .0035 (access to information collected, assembled, or maintained by or for judiciary is governed by rules adopted by Supreme Court of Texas or other applicable laws and rules); Open Records Decision No. 513 at 3 (1988) (information held by grand jury, which is extension of judiciary for purposes of Act, is not itself subject to Act). When an individual or an entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury's constructive

possession and is not subject to the Act. *See* Open Records Decision No. 513 at 3. Information that is not so held or maintained is subject to the Act and may be withheld from the public only if a specific exception to disclosure is shown to be applicable. *Id.* Thus, to the extent that the sheriff has custody of the submitted information as agent of the grand jury, such information is in the grand jury's constructive possession and is not subject to disclosure under the Act. *Id.* at 4. The rest of this decision is not applicable to any such information. To the extent that the sheriff does not have custody of the submitted information as agent of the grand jury, we address your arguments against disclosure.

Next, we note that the submitted information contains medical records, access to which is governed by the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.004. Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370(1983), 343 (1982). We have further found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." Open Records Decision No. 546 (1990).

Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). In this instance, as the patient is a minor,

the medical records may be released only on the signed consent of the parent or legal guardian of the patient. Occ. Code § 159.005(a)(2). That consent must specify (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. We have marked the documents that consist of medical records and are therefore subject to the MPA. This information may be released only in accordance with the MPA.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” and encompasses information protected by other statutes. Section 261.201 of the Family Code provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Because the remainder of the submitted information consists of files, reports, records, communications, or working papers used or developed in an investigation under chapter 261, the information is within the scope of section 261.201 of the Family Code. You have not indicated that the sheriff has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, the remainder of the submitted information is confidential pursuant to section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute). Accordingly, the sheriff must withhold these documents from disclosure under section 552.101 of the Government Code as information made confidential by law.¹ Furthermore, because section 261.201(a) protects all “files, reports, communications, and working papers” related to an investigation of child abuse, the sheriff must not release front page offense report information in cases of alleged child abuse.

¹We note, however, that if the Texas Department of Family and Protective Services has created a file on this alleged abuse, the child’s parent(s) may have the statutory right to review that file. *See* Fam. Code § 261.201(g); Act of June 2, 2003, 78th Leg., R.S., ch. 198, § 1.27, 2003 Tex. Sess. Law Serv. 611, 641 (“A reference in law to the Department of Protective and Regulatory Service means the Department of Family and Protective Services.”).

In summary, to the extent that the sheriff has custody of the submitted information as agent of the grand jury, such information is in the grand jury's constructive possession and is not subject to disclosure under the Act. To the extent that the sheriff does not have custody of the submitted information as agent of the grand jury, 1) medical records may be released only in accordance with the MPA; and (2) the sheriff must withhold the rest of the submitted information under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Cindy Nettles", written over a horizontal line.

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 211291
Enc. Submitted documents

c: Ms. Lisa Martinec
c/o Mr. David K. Walker
Montgomery County Attorney
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Conroe, Texas 77301
(w/o enclosures)